In the Supreme Court of the United States.

OCTOBER TERM, 1977.

No. 77-684

MILTON GREENBLATT, ET AL.,
PETITIONERS,

v.

MITCHELL G. KING, JR.,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

FRANCIS X. BELLOTTI,
Attorney General,
STEPHEN R. DELINSKY,
Assistant Attorney General,
Chief, Criminal Bureau,
BARBARA A. H. SMITH,
Assistant Attorney General,
Chief, Criminal Appellate Section,
KATHLEEN KING PARKER,
Assistant Attorney General,
Criminal Division,
One Ashburton Place, 18th Floor,
Boston, Massachusetts 02108.
(617) 727-2240

Of Counsel:
JOHN P. CORBETT,
Assistant Attorney General.

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS.

Table of Contents.

Table of Authorities Cited.

Cases.

CONSTITUTIONAL AND STATUTORY PROVISIONS.

In the
Supreme Court of the United States.

OCTOBER TERM, 1977.

No. .

MILTON GREENBLATT, ET AL.,
PETITIONERS,

v.

MITCHELL G. KING, JR.,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

The petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on August 15, 1977.

Opinion Below.

The opinion of the Court of Appeals, not yet reported, appears in the Appendix, *infra*. The District Court for the District of Massachusetts did not issue an opinion.

Jurisdiction.

The judgment of the Court of Appeals was entered on August 15, 1977. This petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Questions Presented.

1. Whether the Eleventh Amendment to the Constitution of the United States bars an award of attorneys' fees against officials of the Commonwealth of Massachusetts, in their official capacities.

2. Whether the Civil Rights Attorneys Fees Awards Act of 1976, 42 U.S.C. § 1988, as amended, authorizes the awarding of attorney's fees against state officials in their official capacities, notwithstanding the Eleventh Amendment.

3. Whether the Civil Rights Attorneys Fees Awards Act should apply where the attorneys' services were performed more than two years before the effective date of the Act, and where the only issue pending in the case on the effective date of the Act was the attorneys' fees issue.

Constitutional And Statutory Provisions Involved.

The Eleventh Amendment to the Constitution of the United States provides as follows:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

42 U.S.C. § 1988 (as amended by Pub. L. 94-559, § 2, 90 Stat. 2641, October 19, 1976) provides in applicable part as follows:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Statement Of The Case.

This petition challenges a district court order, affirmed by the Court of Appeals for the First Circuit, awarding respon-

dent's appointed counsel $4,000 in attorneys' fees, the award to be paid by the petitioner state officials.

The original complaint in this case, filed in February, 1972, challenged the use of certain disciplinary procedures on patients confined as "sexually dangerous persons" at the Treatment Center at Massachusetts Correctional Institution, Bridgewater. Respondent (plaintiff below) brought the action pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1343. Counsel was appointed and came into the case in September, 1973.

After one day of trial, the case was settled by the entry of two consent decrees in June, 1974 (App. 1a). These decrees were agreed to constitute a final judgment on all of the respondent's claims except his motion for attorneys' fees, which was filed June 21, 1974.

On October 29, 1974, the district court ordered an award of $4,000 in attorneys' fees, to be paid by the petitioner state officials (defendants below). The petitioners appealed this order. Before the appeal was decided, the court of appeals granted leave to the district court to entertain and rule upon a motion seeking clarification of the October 29, 1974, order. In response to the motion for clarification, the district court modified its order on April 18, 1975. The petitioners appealed the modified order. Before the appeal was decided, the court of appeals remanded the case to the district court for consideration in light of *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975) (App. 2a).

Upon remand, no action was taken in the district court until after the passage of the Civil Rights Attorneys Fees Awards Act of 1976 (hereinafter the Fees Act). On February 17, 1977, the district court entered an order allowing $4,000 as attorneys' fees, under the authority of the Fees

Act (App. 2a). The court of appeals affirmed that order in an opinion dated August 15, 1977 (App. 1a-7a).

The issues raised in this petition are identical to the attorneys' fees issues raised in *Hutto* v. *Finney*, No. 76-1660, certiorari granted October 17, 1977, 46 U.S.L.W. 3256. The *Hutto* case involves a constitutional challenge to practices and conditions in the Arkansas prisons. The federal district court in *Hutto* ordered the State of Arkansas to pay $20,000 in attorneys' fees. The Court of Appeals for the Eighth Circuit affirmed this order and further ordered the state to pay $2,500 in attorneys' fees for the appeal. *Finney* v. *Hutto*, 548 F. 2d 740 (8th Cir. 1977).[1]

Reasons For Granting The Writ.

I. The Eleventh Amendment Bars The Award Of Attorneys' Fees Against The State.

The district court in this § 1983 case has awarded $4,000 in attorneys' fees to respondent's counsel, to be paid by the state official petitioners. This Court has not decided whether such an award is barred by the Eleventh Amendment to the Constitution.

The question was not decided in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 269 n. 44 (1975). It was not decided in *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 456-457 (1976), because there effective Congressional authorization for the fees award existed. The circuit courts

[1] The First Circuit relied on the Eighth Circuit's decision both in this case, App. 3a n. 2, and in *Rodriguez* v. *Jimenez*, 551 F. 2d 877, 878-879 (1st Cir. 1977), an earlier case involving the Fees Act.

which have decided the issue, after *Edelman* v. *Jordan*, 415 U.S. 651 (1974), have reached conflicting results. The Third, Fourth, Fifth and Sixth Circuits have concluded that the Eleventh Amendment prohibits an award of attorneys' fees against an unconsenting sovereign state. *Skehan* v. *Board of Trustees of Bloomsburg State College*, 501 F. 2d 31, 42 (3d Cir. 1974) (dicta), vacated on other grounds, 421 U.S. 983 (1975); *Hallmark Clinic* v. *North Carolina Dept. of Human Resources*, 519 F. 2d 1315, 1316-1317 (4th Cir. 1975); *Named Individual Members, San Antonio Conservation Society*, v. *Texas Highway Dept.*, 496 F. 2d 1017, 1026 (5th Cir. 1974), *cert. denied*, 420 U.S. 926 (1975); *Jordon* v. *Gilligan*, 500 F. 2d 701, 705-710 (6th Cir. 1974), *cert. denied*, 421 U.S. 991 (1975). The First, Second and Seventh Circuits have held that the Eleventh Amendment does not bar an award of fees against a state. *Souza* v. *Travisono*, 512 F. 2d 1137, 1139-1140 (1st Cir. 1975), vacated on other grounds, 423 U.S. 809 (1975); *Class* v. *Norton*, 505 F. 2d 123, 126-127 (2d Cir. 1974); *Bond* v. *Stanton*, 528 F. 2d 688 (7th Cir. 1976), vacated and remanded for further consideration in light of Pub. L. 94-559 (42 U.S.C. § 1988, as amended), 429 U.S. 973 (1976).

The decisions of this Court indicate that the Eleventh Amendment does bar this attorneys' fees award. The funds to satisfy the award must come from the funds of the Commonwealth of Massachusetts, because the defendants are state officials.[1] Thus the award is a monetary award against the Commonwealth itself. *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459 (1945). Furthermore, the award

[1] Petitioners did not raise the Eleventh Amendment defense in the district court or in the court of appeals. However, this defense is a matter of jurisdiction which can be raised for the first time here. *Edelman* v. *Jordan*, 415 U.S. 651, 678 (1974); *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459 (1945).

here resembles an accrued monetary liability resulting from a past breach of legal duty; thus it is barred by the Eleventh Amendment. *Edelman* v. *Jordan*, 415 U.S. 651 (1974).

The award here is not the incidental effect of injunctive relief against the state, permissible under *Ex parte Young*, 209 U.S. 123 (1908). The consent decree in this case granted relief which had no effect on the Commonwealth's funds, as that decree only stopped certain disciplinary procedures. Neither is this award like costs of litigation, which can be awarded against a state under *Fairmont Creamery Co.* v. *Minnesota*, 275 U.S. 70 (1927). This Court's decision in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975), demonstrates that costs and attorneys' fees are generically different from one another. Thus the award here resembles none of the recognized exceptions to the Eleventh Amendment's bar to recovery of money from a state. The court of appeals erred in affirming the award of attorneys' fees.

II. The Validity Of The Civil Rights Attorneys Fees Awards Act Of 1976, As Applied To An Award Against A State, Has Not Been Decided By This Court.

Petitioners recognize that Congress can limit the Eleventh Amendment by legislation enacted under § 5 of the Fourteenth Amendment. *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976). The Civil Rights Attorneys Fees Awards Act, however, is not the necessary authorization for the award of attorneys' fees against a state.

Proper statutory authorization to sue the state was the basis for this Court's holding in *Fitzpatrick* v. *Bitzer*, *supra*, that money damages and attorneys' fees could be awarded against a state, notwithstanding the Eleventh Amendment,

in suits under Title VII of the Civil Rights Act of 1964, 42 U.S.C §§ 2000e et. seq. (1970 ed. Supp. IV). The proper statutory authorization for a money award against the state in *Fitzpatrick* was the express authorization to sue the state as employer found in 42 U.S.C. §§ 2000e(a) and 2000e-5(g) (1970 ed. Supp. IV).

The Fees Act here is different from the statute in *Fitzpatrick*. The Fees Act here allows the prevailing party to recover attorneys' fees in a suit under 42 U.S.C. § 1983. It does not authorize a suit against the state under § 1983. It is settled that a state is not a "person" which can be sued under § 1983. *Monroe* v. *Pape*, 365 U.S. 167, 187-191 (1961); *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 452 (1967). In passing the Fees Act, Congress did not amend § 1983 to authorize a suit against a state. Therefore, statutory authorization to sue the state, which allowed damages and attorneys' fees under Title VII in *Fitzpatrick*, does not exist in this case. It follows that the Fees Act does not abrogate the Eleventh Amendment bar to the award of attorneys' fees here. See *Skehan* v. *Board of Trustees of Bloomsburg State College*, 46 U.S.L.W. 2045 (W.D. Pa. Aug. 2, 1977). Thus the court of appeals erred in applying the Fees Act.

III. Retrospective Application Of The Fees Act To Authorize Attorneys' Fees Awards Against States Is Manifestly Unjust.

The court of appeals held that the Fees Act should apply in this case, even though the attorneys' services were performed several years before the effective date of the Fees Act, and even though the state treasury will pay the award (App. 3a n. 2). Petitioners urge that, if the Fees Act is held to have abrogated the Eleventh Amendment defense, then the retrospective application of the Fees Act in this case is "manifestly unjust" and therefore within the express exception to the rule of *Bradley* v. *School Board of City of Richmond*, 416 U.S. 696 (1974).

In *Bradley*, this Court held that the statute authorizing attorneys' fees in school desegregation cases (20 U.S.C. § 1617) should be applied to cases in which the propriety of an attorneys' fees award was pending resolution on appeal on the effective date of the statute. The *Bradley* rule, however, is not without limitation; an exception to the rule should be made to prevent manifest injustice. 416 U.S. at 716-721.

This Court noted three factors to be examined in determining whether manifest injustice is worked by the retrospective application of a fees statute: the identity of the parties, the nature of their rights, and the impact of the change in law upon those rights. 416 U.S. at 717. In this case, the petitioners are state officials, but the real party in interest is the Commonwealth of Massachusetts. The Commonwealth's resources are limited; the demands on those resources, overwhelming. The award has not been budgeted.

Indeed, the award here is an unforeseeable obligation imposed on the state by the enactment of the Fees Act. Before the Act, the state had a defense to the award, based on the Eleventh Amendment. Had the state defendants been able to foresee this new attorneys' fees obligation, they might have conducted this litigation differently in order to limit or eliminate their liability for attorneys' fees.

Massachusetts is not the only state affected by the retrospective application of the Fees Act; nor is this the only case in which Massachusetts is vulnerable.[3] Many civil rights

[3] Petitioners do not contend that the $4,000 award here is unduly burdensome. In other cases pending in the District of Massachusetts, however, the Commonwealth is potentially liable for much larger awards. An informal survey of cases handled in this office shows that we are handling at least twenty significant civil rights cases in which the Commonwealth might be held liable for attorneys' fees. A conservative estimate of our total potential liability for fees in these twenty cases is a figure in excess of $350,000.

cases against state officials are pending on federal dockets; some have been pending for years before the enactment of the Fees Act. Some of these cases, like this one, have been settled by consent decrees which do not resolve the attorneys' fees problem. The potential financial consequences of the Fees Act to all the states are alarming, even if the Act has only prospective effect. The consequences of the retrospective application of the Act are grave.

Conclusion.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the First Circuit.

Respectfully submitted,

FRANCIS X. BELLOTTI,
Attorney General,
STEPHEN R. DELINSKY,
Assistant Attorney General,
Chief, Criminal Bureau,
BARBARA A. H. SMITH,
Assistant Attorney General,
Chief, Criminal Appellate Section,
KATHLEEN KING PARKER,
Assistant Attorney General,
Criminal Division,
One Ashburton Place, 18th Floor,
Boston, Massachusetts 02108.
(617) 727-2240

Of Counsel:
JOHN P. CORBETT,
Assistant Attorney General.

United States Court of Appeals for the First Circuit

No. 74-1425

MITCHELL G. KING, JR.,
PLAINTIFF, APPELLEE,
v.
MILTON GREENBLATT, ET AL.,
DEFENDANTS, APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. CHARLES E. WYZANSKI, JR., *U.S. District Judge*]

Before
COFFIN, *Chief Judge*,
LAY, *Circuit Judge*,*
CAMPBELL, *Circuit Judge*.

Kathleen King Parker, Assistant Attorney General, with whom *Francis A. Bellotti*, Attorney General, *Stephen R. Delinsky*, Assistant Attorney General, Chief, Criminal Bureau and *Barbara A. H. Smith*, Assistant Attorney General, Chief, Criminal Appellate Section were on brief, for appellants.
John H. Hene, with whom *Foley, Hoag & Eliot* was on brief, for appellee.

August 15, 1977

CAMPBELL, *Circuit Judge*. This is an appeal from the award of $4,000 in attorney's fees to Mitchell B. King, Jr. whose civil rights suit to improve his conditions of confinement at the treatment center for the sexually dangerous at MCI Bridgewater culminated in two June 1974 consent decrees in his favor. On October 29, 1974, several

* Of the Eighth Circuit, sitting by designation.

months after the matter was concluded, the district court awarded $4,000 to King's attorney "[f]or ten hours in court and seventy hours of preparation" at a rate of $50 per hour. Defendants — state officials acting in their official capacities — appealed but thereafter withdrew their appeal by permission of this court to seek clarification of the district court's order. While the motion to clarify was before the district court, we decided *Souza* v. *Travisono*, 512 F.2d 1137 (1st Cir.), *vacated*, 423 U.S. 809 (1975). In light of that decision, the district court on April 18, 1975, modified its earlier order and awarded $1,964 to reflect the $30 per in-court hour and $20 per out-of-court hour rate of the Criminal Justice Act of 1964, 18 U.S.C. § 3006A(d)(1). The appeal from this second order was pending when the Supreme Court decided *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y.*, 421 U.S. 240 (1975), and on July 15, 1975, we remanded to the district court for reconsideration in view of *Alyeska*. Because a decision by another judge on substantially the same issue was anticipated, both parties suggested that the district court stay further action. As a result, the case lay dormant until December 22, 1976 when appellee moved that this court revoke its July 15, 1975 remand order on the ground that the order had been mooted by the recently enacted Civil Rights Attorney's Fees Award Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (amending 42 U.S.C. § 1988). We denied the motion without prejudice to the district court's giving consideration to the Act's applicability. The district court directed the defendants to show cause why the original $4,000 fee award should not be imposed. After taking briefs on the issue, by order of February 17, 1977, it allowed compensation in the amount of $4,000, incorporating by reference the original October 29, 1974 order, all other proceedings in the district court and this court, and the briefs of the parties in response to

the show cause order. The appeal from the February order was consolidated with the prior appeals.

The question is whether "reasonable attorney's fees" as provided by the Civil Rights Attorney's Fees Award Act of 1976 (the Fees Act)[1] are still to be computed at the rate established by the Criminal Justice Act applied in *Souza* v. *Travisono, supra*, or whether a different standard should apply.[2]

Appellants argue that *Souza* established this circuit's standard for reasonable attorney's fees in civil rights cases and that the standard remains unaffected by passage of the Fees Act. Pointing to the district court's finding that this case was not "of truly exceptional public importance" and arguing that the effect of inflation should not be an issue — the services were rendered at approximately the same time as those in *Souza* — appellants urge that the district court's award of $1,964 was the proper amount. When we decided *Souza* there was no statute authorizing

[1] 42 U.S.C. § 1988 as amended reads in relevant part:

"In any action, or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

[2] We do not accept appellants' threshold claim that the Fees Act may not be applied retroactively because the Commonwealth is the real party in interest and the state treasury will pay the award. In *Martinez Rodriguez* v. *Jimenez*, 551 F.2d 877, 878-79 (1st Cir. 1977), also a prisoners' rights case, we held, in express agreement with the Eighth Circuit's decision in *Finney* v. *Hutto*, 548 F.2d 740 (8th Cir. 1977), that the Fees Act would apply to cases on direct appeal at the time the Act was passed and that the eleventh amendment did not bar awards under the Act. The Fifth Circuit has since adopted the same view, *Rainey* v. *Jackson State College*, 551 F.2d 672, 675-76 (5th Cir. 1977), and the Ninth Circuit, while not discussing the eleventh amendment issue, has held that the Fees Act applies to pending actions, *Stanford Daily* v. *Zurcher*, 550 F.2d 464, 465-66 (9th Cir. 1977). That the taxpayers will have to pay does not constitute manifest injustice so as to avoid the rule of *Bradley* v. *Richmond School Board*, 416 U.S. 696 (1974). Appellants "would not have ordered their conduct differently if they had known the new statute was going to apply." *Martinez Rodriguez* v. *Jimenez*, *supra*, 551 F.2d at 878 n.4, *citing Bradley* v. *Richmond School Board*, *supra*, 416 U.S. at 716-21.

"a reasonable attorney's fee as part of the costs" in cases brought under 42 U.S.C. § 1983. The lack of authoritative guidance, the bar's traditional duty to assist in public service litigation regardless of fee, and our concern with possible excessiveness, all dictated a cautious approach. The conservative Criminal Justice Act rates which, while below the going marketplace rates had the imprimatur of legislative approval, seemed most appropriate at the time. Passage of the Fees Act has, however, rendered obsolete the considerations underlying *Souza*. Not only has Congress now provided for attorney's fees awards in civil rights cases, the Act's legislative history leaves no doubt that Congress intended not only that the fees be adequate enough to "attract competent counsel"[3] but "that the amount . . . [would] be governed by the same standards which prevail in other types of equally complex federal litigation such as antitrust cases".[4] Mechanical application of the Criminal Justice Act fee scale obviously does not meet these criteria, and we shall therefore no longer require adherence to *Souza*.

What constitutes a reasonable attorney's fee in a particular case shall rest within the sound discretion of the district court, *see Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714, 717 (5th Cir. 1974). We shall, however, expect a court to adhere carefully to certain general criteria in making a discretionary award under the Fees Act.

The Fifth Circuit's decision in *Johnson* v. *Georgia Highway Express, Inc., supra*, was cited with approval in the legislative history of the Fees Act and in decisions of the Eighth, Ninth, and D.C. Circuits.[5] *Johnson* listed twelve

[3] S. Rep. No. 1011, 94th Cong., 2d Sess. 6, *reprinted in* [1976] U.S. Code Cong. & Ad. News 5908, 5913; H. Rep. No. 1558, 94th Cong., 2d Sess. 9 (1976).

[4] S. Rep. No. 1011, *supra* at 6, [1976] U.S. Code Cong. & Ad. News at 5913.

[5] Although not necessarily in civil rights cases where the Fees Act applies, these decisions all dealt with the award of "reasonable" fees as provided for by statute. *See Finney* v. *Hutto*, 548 F.2d 740, 742 (8th Cir. 1977) (Fees Act); *Kerr* v. *Screen Extras Guild*, 526 F.2d 67, 70 (9th Cir. 1975), *cert. denied*, 425 U.S. 951 (1976) (Labor-Management Relations Reporting and Disclosure Act); *Evans* v. *Sheraton Park Hotel*, 503 F.2d 177, 188 (D.C. Cir. 1974) (Title VII).

factors to be considered by district courts in arriving at reasonable fees awards: 1) the time and labor required; 2) the novelty and difficulty of the question presented; 3) the skill required to perform the legal services; 4) the preclusion of other employment by the attorney due to acceptance of the case; 5) the customary fee in the community; 6) whether the fee is fixed or contingent; 7) time limitations imposed by client or circumstances; 8) the amount involved and the results obtained; 9) the experience, reputation and ability of the attorney; 10) the undesirability of the case; 11) the nature and length of the professional relationship with the client; 12) awards in similar cases. *Id.* at 717-19. These criteria are similar to those in the ABA Code of Professional Responsibility[6] and we approve them for use in Fees Act cases within this circuit with the following observations.

[6] Ethical Consideration 2-18 reads in relevant part,

> "The determination of the reasonableness of a fee requires consideration of all relevant circumstances, including those stated in the Disciplinary Rules [set out below]. The fees of a lawyer will vary according to many factors, including the time required, his experience, ability, and reputation, the nature of the employment, the responsibility involved, and the results obtained. . . ." [Footnote omitted.]

Disciplinary Rule 2-106(B) provides:

> "A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:
>
> (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
> (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
> (3) The fee customarily charged in the locality for similar legal services.
> (4) The amount involved and the results obtained.
> (5) The time limitations imposed by the client or the circumstances.
> (6) The nature and length of the professional relationship with the client.
> (7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
> (8) Whether the fee is fixed or contingent."

As a starting point the attorney or attorneys must submit to the court a detailed record of the time spent on the case and the duties performed. *See Stanford Daily* v. *Zurcher*, 64 F.R.D. 680, 682 (N.D. Cal. 1974), *aff'd*, 550 F.2d 464 (1977). The court must secure from the attorneys a full and specific accounting for their time; bills which simply list a certain number of hours and lack such important specifics as dates and the nature of the work performed during the hour or hours in question should be refused. Furthermore, "[a]n attorney's record of time is not a talisman", *Rainey* v. *Jackson State College*, 551 F.2d 672, 677 (5th Cir. 1977); the district court should scrutinize it with care.

> "The trial judge should weigh the hours claimed against his own knowledge, experience, and expertise of the time required to complete similar activities. If more than one attorney is involved, the possibility of duplication of effort along with the proper utilization of time should be scrutinized. The time of two or three lawyers in a courtroom or conference when one would do, may obviously be discounted. It is appropriate to distinguish between legal work, in the strict sense, and investigation, clerical work, compilation of facts and statistics and other work which can often be accomplished by non-lawyers but which a lawyer may do because he has no other help available. Such non-legal work may command a lesser rate. Its dollar value is not enhanced just because a lawyer does it."

Johnson v. *Georgia Highway Express, Inc.*, *supra*, 488 F.2d at 717.

Once the time and labor required have been fully evaluated, the district court should apply the relevant *Johnson* criteria in arriving at a reasonable fee. In so doing, it

would be helpful for the court to set out in the record the basis for the award and any pertinent findings of fact. *See, e.g., Stanford Daily* v. *Zurcher*, *supra*. Care obviously should be taken to avoid excessive fees. The "normal" per hour rate in a locale is itself an artificial construct. Actual bills will frequently be lower, sometimes much lower, than that rate might indicate; on exceptional occasions they may however exceed it. While the modest Criminal Justice Act rates might allow a more mechanical application, an assumed marketplace rate is never to be applied across the board without regard to the difficulty of the work, the results achieved and all other relevant factors.

There remains the question of the disposition of the matter before us. We have reviewed the record with care and conclude that the $4,000 award was reasonable under the *Johnson* criteria. The case involved important issues; the results were distinctly beneficial and peculiarly dependent upon the work of counsel; and there are findings that the attorney performed with commendable diligence and ability. While the court used a $50 an hour yardstick, it appears that more than 80 hours was actually spent by the attorney; we are satisfied that the award was not computed mechanically and that it reflects an appropriate sensitivity to relevant considerations. Bearing in mind that the fees issue has remained unresolved since 1974, we believe it both unnecessary and unduly burdensome to remand to the district court for yet a further round of consideration. We therefore affirm.

Affirmed.